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(4)

In The

Supreme Court of the United States

October Term, 1996

LORELYN PENERO MILLER,

Petitioner,

v.

MADELEINE K. ALBRIGHT,
Secretary of State of the United States,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Is the distinction in 8 U.S.C. Section 1409(a) between "illegitimate" children of U.S. citizen mothers and "illegitimate" children of U.S. citizen fathers a violation of the Fifth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

PETITIONER:

Lorelyn Penero Miller

RESPONDENT:

Madeleine K. Albright, Secretary of State of the United States

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PETITIONER'S BRIEF

Lorelyn Penero Miller hereby requests this Court reverse, in part, the judgment of the District of Columbia Circuit of the Court of Appeals, and remand with instructions.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 96 F.3d 1467 and is reproduced at Appendix A of the Petition for Writ of Certiorari at 1 [hereinafter Pet. App.]. The Memorandum Opinion and Order, April 29, 1994, Royce C. Lamberth, United States District Judge, Civil Action No. 93-1182, U.S. District Court, District of Columbia is reported at 870 F. Supp. 1 and is reproduced at Appendix B, Pet. App., at 26. The decision of Thomas W. Callow, Acting Director, Office of Citizen Consular Services, dated, November 5, 1992, is found in Appendix C, Pet. App., at 32.

STATEMENT OF JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1). The jurisdiction of the District Court was pursuant to 5 U.S.C. Section 704 and 28 U.S.C. Section 1331. The jurisdiction of the Court of Appeals was pursuant to 28 U.S.C. Section 1291 (Final Decisions of District Courts). The appeal was filed June 15, 1994 from

a Memorandum Opinion and Order, entered on April 29, 1994, dismissing the case.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This petition concerns the due process clause of the Fifth Amendment with its guarantee of equal protection under the law.

8 U.S.C. Section 1401. Nationals and citizens of the United States at birth

The following shall be nationals and citizens of the United States at birth: . . .

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: *Provided,* That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of Title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United

States Government or an international organization as defined in section 288 of Title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and . . .

8 U.S.C. Section 1409. Children born out of wedlock

(a) The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title shall apply as of the date of birth to a person born out of wedlock if –

(1) a blood relationship between the person and the father is established by clear and convincing evidence,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years –

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court.

(b) Except as otherwise provided in section 405 of this Act, [8 USCS], the provisions of section 1401(g) of this title shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, as of the date of birth, if the paternity of such child is established at any time and while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

STATEMENT OF THE CASE

A. Factual Background

The Plaintiff, Lorelyn Penero Miller, was born on June 20, 1970, in Angeles City, Republic of the Philippines, the daughter of Luz Penero, a Philippine citizen, and Charlie R. Miller, a United States citizen. The Plaintiff's parents were not married at the time of her birth, nor did they subsequently marry. Her father, Charlie R. Miller, was a United States serviceman who left the Philippines upon the conclusion of his tour of duty. On July 27, 1992, the 321st Judicial District Court of Smith County, Texas signed a Voluntary Paternity Decree declaring, at

the request of Charlie R. Miller, that the Plaintiff was his biological and legal child. The decree legitimizes Lorelyn at birth (Appendix E, Pet. App. at 37).

In November 1991, Plaintiff, Lorelyn Penero Miller, duly applied to Defendant for registration as a United States citizen and for issuance of a passport pursuant to 22 U.S.C. Section 221A and 22 C.F.R. Sections 5.13 and 5.120. The application was denied in a letter dated March 23, 1992. A copy of the Voluntary Paternity Decree and other information was provided to the Defendant and reconsideration of the application by the Defendant was requested. In a letter, dated August 11, 1992, from Richard Roseman, Chief Passport and Citizenship Unit, United States Embassy, Manila, it was stated:

> "Thank you for your letter of July 30, 1992 regarding the registration as a U.S. citizen of Lorelyn Penero Miller.
>
> We are forwarding a copy to the State Department of the petition decree which legitimizes Lorelyn, and we are asking that the case be reconsidered. Although the final determination will be made in Washington, in our opinion the petition decree legitimizes Lorelyn at birth. Should the Department agree with us, we will be most pleased to register her as a U.S. citizen and issue her a U.S. passport.
>
> We will contact Lorelyn directly as soon as a decision is reached in this matter." (Appendix D, Pet. App., at 36)

In a subsequent letter dated August 28, 1992, Mr. Roseman informed the Plaintiff, Lorelyn Penero Miller, that her application for registration as U.S. citizen had

been denied for the stated reason that her legitimation had not occurred prior to her eighteenth birthday.

In a notice dated November 5, 1992, Plaintiff was informed that Thomas W. Callow, Acting Director, Office of Citizens Counselor Services, had upheld the decision denying Plaintiff recognition as a U.S. citizen and denying a passport to the Plaintiff (Appendix C, Pet. App., at 32). The Plaintiff then filed suit in the Eastern District of Texas on January 22, 1993. The Plaintiff's father, Charlie R. Miller, was dismissed as a Plaintiff and the case was transferred to the United States District Court for the District of Columbia by an Order signed on the 2nd day of June, 1993.

B. Proceedings Before the District Court

In a Memorandum Opinion and Order (Appendix B, Pet. App. 26) filed April 29, 1994, the case was dismissed by Judge Royce C. Lamberth, United States District Judge for the District of Columbia, on the basis that Ms. Miller lacked standing.

C. Proceedings Before The Court of Appeals

The Plaintiff appealed to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals held:

> . . . that Ms. Miller had standing to bring this action; but in light of controlling Supreme Court precedent, we conclude that the challenged statute [8 U.S.C. § 1409] is constitutional." (Appendix A, Pet. App. at 2)

The Court of Appeals believed that the Supreme Court's decision in *Fiallo v. Bell*, 430 U.S. 787 (1977) foreclosed it from holding 8 U.S.C. Section 1409 unconstitutional.

Judge Wald wrote a separate opinion in which she "regretfully" concurred in the judgment against Ms. Miller. She concluded:

> *Fiallo* is a Supreme Court decision directly on point and, as a result, we have no choice but to hold section 1409(a) constitutional. Yet I think it is important to underscore the extent to which *Fiallo* is out of step with the Court's current refusal to sanction "official action that closes a door or denies opportunity to women (or to men)" based on stereotypes or "overbroad generalizations" about men and women. *Virginia*, 116 S.Ct. at 2275. *Fiallo* is a precedent whose time has come and gone; it should be changed by Congress or the Supreme Court. (Appendix A, Pet. App. at 25)

SUMMARY OF ARGUMENT

The Plaintiff seeks a finding that she was a U.S. Citizen by birth. Using the distinction in 8 U.S.C. Section 1409(a) between "illegitimate" children of U.S. Citizen mothers and U.S. Citizen fathers is unconstitutional.

The Court has held that parties who seek to defend gender based distinctions contained in statutes must demonstrate an "exceedingly persuasive justification." That a statute discriminates against males rather than females does not exempt it from scrutiny.

8 U.S.C. Section 1409 discriminates both on the basis of "legitimate" and "illegitimate" and on the basis of gender of parents. It punishes children for the conduct of their parents. The children of male U.S. citizens "can effect neither their parents' conduct nor their own status".

The government seizes upon the problem of proof of paternity. The Court has held that while this can not be lightly brushed aside, neither can it be an impenetrable barrier. Statutes must be "carefully tuned to alternative considerations". 8 U.S.C. Section 1409 is not. It denies equal protection because it only applies where the American citizen parent is the father. There is no rational basis for this distinction. Modern genetic testing eliminates the rationale for arbitrary time limits on the establishment of paternity for a child.

8 U.S.C. Section 1409 will not pass a rational basis test, much less a requirement for an "exceedingly persuasive justification". Intentional discrimination on the basis of gender violates the Equal Protection Clause where it serves to ratify and perpetuate "overbroad stereotypes about the relative abilities of men and women". 8 U.S.C. Section 1409 is another "overbroad generalization" which violates equal protection.

Fiallo v. Bell, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) is out of step with this standard and the more resent decisions of the Supreme Court and other Courts. Further, *Fiallo* can be distinguished because this case represents not a congressional determination that various

aliens should or should not be treated in a certain manner, but rather a decision as to who is a citizen in the first instance.

ARGUMENT

Is the distinction in 8 U.S.C. Section 1409(a) between "illegitimate" children of U.S. citizen mothers and "illegitimate" children of U.S. citizen fathers a violation of the Fifth Amendment to the United States Constitution?

The District Court did not reach the issue of constitutionality of 8 U.S.C. Section 1409(a). The Court of Appeals felt that *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) was controlling.

> As a practical matter, there is no distinction between the rights under the Act of the legitimate and illegitimate children of American women born outside the United States and its possessions. In each instance, only the fact of the mother's U.S. citizenship at the time of the child's birth need be established. Therefore, the issue before us is whether the additional requirements imposed by section 1409(a) on the illegitimate child of an American father represent an unconstitutional denial of equal protection based on (a) the status of the child and (b) the sex of the parent. We find the Supreme Court's decision in *Fiallo* to be dispositive on both counts. (Appendix A, Pet. App. at 10)

Whether *Fiallo v. Bell*, 440 U.S. 787, 52 L.Ed.2d 50, is dispositive is open to question. The Ninth Circuit correctly points out in *Wauchope v. U.S. Department of State*, 985 F.2d 1407 (9th Cir. 1993):

> "Unlike the Government decision at issue in *Fiallo* and *Mandel*, Section 1993 represents not a Congressional determination that various aliens should or should not be treated in a certain manner, but rather a decision as to who is a citizen in the first instance. This type of decision strikes us as fundamentally different from one concerning individuals as to whose alienage there exists no dispute, such that we should perhaps utilize a more traditional (and hence more rigorous) standard of scrutiny in assessing it."

While this references another section, the reasoning applies with equal vigor to Section 309. The present case can be distinguished and relief can be granted to the Petitioner without overturning *Fiallo*.

However, as Judge Wald, in her concurring opinion, concludes:

> . . . I think it is important to underscore the extent to which *Fiallo* is out of step with the Court's current refusal to sanction "official action that closes a door or denies opportunity to women (or to men)" based on stereotypes or "overbroad generalizations" about men and women. *Virginia*, 116 S.Ct. at 2275. *Fiallo* is a precedent whose time has come and gone; it should be changed by Congress or the Supreme Court. (Appendix A, Pet. App., at 25)

This Court has stated in *U.S. v. Virginia*, ___ U.S. ___, ___, 116 S.Ct. 2264, 2274 (1996):

> Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.

In demonstrating that "exceedingly persuasive justification":

> The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, 73 L.Ed.2d 1090, 102 S.Ct. 3331, 3336 citing *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150, 64 L.Ed.2d 107, 100 S.Ct. 1540, 1545 (1980)

In *Mississippi University for Women*, 458 U.S. at 723, 102 S.Ct. at 3335, the Court states:

> That this statutory policy discriminates against males rather that against females does not exempt it from scrutiny or reduce the standard of review.

The Court further states at 458 U.S. 724, 102 S.Ct. 3336:

> Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.

While only a district court decision, *LeBrun v. Thornburgh*, 777 F. Supp. 1204 (D.N.J. 1991), is a well reasoned opinion which analyzes *Fiallo v. Bell*. In it the Court finds the statute in question, INA Section 309 (8 U.S.C. Section 1409), is unconstitutional because of its requirement that a foreign born child of a U.S. male citizen be formally

legitimated by the age of twenty-one (now amended to age eighteen). The Court stated:

> The discrimination in § 309 between persons on the basis of "illegitimacy" is an archaic reminder of past discriminatory treatment of individuals in society, both in terms of the stigma of the label "illegitimate" with which it branded the children of unwed parents, and in terms of the sex discrimination that was reflected in the law that a man could "legitimate" a child whereas a woman could not. In addition to being inhumane and unfair in this way, a distinction on the bases of "legitimacy" is also an impractical distinction in today's society where unwed mothers abound, and single parenthood has become norm . . .
>
> Accordingly, the court concludes that the distinction in the Act between the "legitimate" and "illegitimate" children is an unconstitutional violation of the Equal Protection Clause . . . " *LeBrun* at 1213

It appears the opinion of the District Court was so well reasoned that the government did not see fit to take an appeal to the Circuit Court.

In *Trimble v. Gordon*, 430 U.S. 762, 772, 97 S.Ct. 1459, 1466, 52 L.Ed.2d 31 (1977) the Court established a standard for examining statutes that distinguish between "legitimates" and "illegitimates", under which the question is whether the statute "is carefully tuned to alternative considerations". The Court took into account "the lurking problems with respect to the proof of paternity" but noted that while these problems

> . . . are not to be lightly brushed aside, . . . neither can they be made into an impenetrable barrier that works to shield otherwise insidious discrimination . . . (430 U.S. at 771, 97 S.Ct. at 1466).

In *LeBrun v. Thornburgh* at 1211, it is stated:

> . . . The Court concludes that § 309 is not "carefully attuned to alternative considerations". Even under a minimum rationality standard, the distinction made in Section 309 of the statute must fail. Moreover, under the standard articulated in *Rogers v. Bellei*, the distinction is not only unreasonable and arbitrary, but it is also, under the Equal Protection Clause, unlawful.

In *LeBrun*, the Court also observes that the statute conditions the retention of citizenship upon an official act by the father of illegitimate children. Courts have long recognized that the rights of one cannot be made contingent upon the rights of another and an individual keeps his citizenship unless "he voluntary relinquishes it". *LeBrun* at 1211 citing *Afroyim v. Rusk*, 387 U.S. 253, 262, 87 S.Ct. 1660, 1665, 18 L.Ed.2d 757 (1967).

In *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) the Supreme Court invalidated the Texas statute which withheld, from local school districts, any state funds for the education of children who were not legally admitted into the United States, and which authorized local school districts to deny enrollment to such children. The Court held the statute violated the Equal Protection Clause of the Fourteenth Amendment, stating the children, who were the Plaintiff's in the case before it, "can effect neither their parents' conduct nor

their own status". The Court held that to punish children for the conduct of their parents "does not conform with fundamental concepts of justice". The Court went on to cite its ruling in *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164, 175, 92 S.Ct. 1400, 1406-07, 37 L.Ed.2d 768 (1972):

> . . . visiting condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual – as well as unjust – way of deterring the parent.

In *LeBrun v. Thornburgh*, at 1212, the Court says:

> "It is wrong for a father to have the unilateral ability to confer or deny citizenship to his daughter."

Mr. Miller does not wish to deny citizenship to his daughter. Under Texas law she will inherit his property as his daughter. Section 309(a)(4), as interpreted by the Defendant, violates the Equal Protection Clause.

8 U.S.C. Section 1401(g) grants nationality and citizenship to a person born outside the geographical limits of the United States and its outlying possession who has one parent who is a U.S. citizen who resided in the United States prior to the person's birth.

Plaintiff meets the requirements of this section in that she was born in the Philippines and her father, Charlie R. Miller, satisfies the parental requirement. 8 U.S.C. Section 1409, "Children born out of wedlock", takes away the

grant of citizenship conferred by Section 1401(g) unless certain things have occurred during the minority of the child: a) the person is legitimate under the law of the person's residence or domicile; b) the father acknowledges paternity of the person in writing under oath; or c) the paternity of the person is established by adjudication of a competent court. The language of 8 U.S.C. Section 1401(g) is a blanket grant of citizenship to a group. This group includes the Plaintiff. But we have a later attempt in 8 U.S.C. 1409 to take away, or limit, that blanket grant and to take it away from illegitimate children of U.S. citizen fathers.

8 U.S.C. Section 1409 is an unconstitutional violation of the Equal Protection Clause because it applies only when the American citizen parent is a man – the father. It does not apply to situations where the American citizen parent is a woman – the mother. Moreover, it requires that the acts of legitimation or "adjudication" be undertaken and completed during the minority of the child. There are two forms of constitutionally impermissible discrimination in 8 U.S.C. Section 1409 – discrimination against illegitimate children as a class as well as gender based discrimination.

In the context of this Federal Nationality Statute, the Due Process Clause of the Fifth Amendment has been found to provide equal treatment co-extensive with that of the Equal Protection Clause of the Fourteenth Amendment. See *Boiling v. Sharpe*, 347 U.S. 497 (1954).

In defending 8 U.S.C. Section 1409, the Defendant has stated:

> The government also has an obvious interest in insuring that there is, in fact, a blood relationship between the child seeking American citizenship and American citizen parent. Maternity is rarely a factual issue, whereas paternity is frequently placed in issue in the human experience. The possibility for fraud in connection with citizenship claims based upon the father's American citizenship, therefore, is more likely, and more difficult to prove or disprove. (Page 9 of Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss.)

In her concurring opinion in the Court of Appeals, Judge Wald states:

> Unlike the majority, I see no rational basis for a law that requires a U.S. citizen father, but not a U.S. citizen mother, to formally legitimate a child before she reaches majority as well as agree in writing to provide financial support until that date or forever forfeit the right to transmit citizenship. Rather, I believe that this requirement is based simply on the stereotyping assumption that a mother will be closer to her child born out of wedlock than a father will be to his. Unfortunately, however, I also believe that the Supreme Court's decision in *Fiallo v. Bell*, 430 U.S. 787 (1977), forecloses us from holding that the imposition of such requirements on U.S. citizen fathers but not on U.S. citizen mothers is unconstitutional, and thus, I regretfully concur in the judgment against Ms. Miller. (Appendix A, Pet. App., at 15)

Judge Wald concludes:

> Notably, and regrettably, *Fiallo* treated the fear of legislating on the basis of stereotypes with a somewhat cavalier disdain, remarking in a footnote that any complaints that statutory distinctions between the illegitimate children of mothers and fathers and their illegitimate children are "based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children" were more appropriately addressed to Congress. *Id.* at 799 n.9.

Fiallo is a Supreme Court decision directly on point and, as a result, we have no choice but to hold section 1409(a) constitutional. Yet I think it is important to underscore the extent to which *Fiallo* is out of step with the Court's current refusal to sanction "official action that closes a door or denies opportunity to women (or to men)" based on stereotypes or "overbroad generalizations" about men and women. *Virginia*, 116 S.Ct. at 2275. *Fiallo* is a precedent whose time has come and gone; it should be changed by Congress or the Supreme Court. (Concurring Opinion, p. 8.) (Appendix A, Pet. App. at 25)

In *Albang v. Reno*, 52 F.3d 801, 805 (9th Cir. 1995), cert. denied, 116 S.Ct. 701 (1996), the Court upheld a provision of the Nationality Act of 1940, 54 Stat. 1137, concerning illegitimate children, citing in support of its decision, a note from *Fiallo v. Bell*:

> The inherent difficulty of determining the paternity of a illegitimate child is compounded when it depends upon events that may have occurred in foreign countries many years earlier.
>
> 43 U.S. at 799 n. 8, 97 S.Ct. at 1482 n. 8

The question can be asked: Do these difficulties change at a given age as to the father, but not as to the mother?

> Before the advent of reliable genetic testing, this requirement of legitimation may well have been a reasonable method for preventing fraud, as false fathers would be more likely to claim paternity once a child had reached majority and no financial responsibility to the child remained. In the absence of "clear and convincing" evidence of the blood tie, such as genetic testing, this legitimation requirement might well have been a useful proxy.
>
> But Congress itself has acknowledged that genetic testing is extremely reliable. In the Child Support Enforcement Amendments of 1984, Congress required states, as a condition of receiving federal funds, to eliminate laws establishing statutes of limitation on proof of paternity:
>
> > Relatively short statutes of limitation were enacted in the past in order to prevent stale claims and to protect a man from having to defend himself against a paternity action brought years after the child's birth when witnesses may have disappeared and memories may have become faulty. Recent progress in developing highly specific tests for genetic markers now permits the exclusion of over 99 percent of those wrongly accused of paternity regardless of the age of the child. *These advances in scientific paternity testing eliminate the rationale for placing arbitrary time limitations on the establishment of paternity for a child* and therefore the obligation to support that child.

> H. REP. No. 527, 98th Cong., 1st Sess. 38 (1983) (emphasis added). Since Congress itself has acknowledged that the accuracy of genetic testing has "eliminate[d] the rationale" for time limits on the establishment of paternity, the fear of fraud cannot be a facially legitimate and *bona fide* reason for requiring fathers – and only fathers – to take special actions to legitimate and agree to support their child by a certain date. (Concurring Opinion, Court of Appeals) (Appendix A, Pet. App. at 18)

The government acknowledges that 8 U.S.C. Section 1409 makes distinctions based on gender in the ability to transmit citizenship. In *LeBrun v. Thornburgh*, 777 F. Supp. 1204 (D.N.J. 1991) discussed above, Judge Sarokin found that:

> The Court concludes that the applicable law discriminates against "illegitimate" children, and thereby violates the Equal Protection Clause of the United States Constitution. The law as it then existed and as applied in this matter serviced to make the citizenship of children born out of wedlock to American fathers, particularly those serving in the armed forces, subject to the personal vagaries and consciences of their fathers. Those who choose to act with honor could confer such citizenship, and those who chose not to, could deny citizenship to their offspring. Even the dilatory father, as in this same case, could defeat his child's claim to citizenship merely by delaying the recognition of his responsibility, until it was too late to satisfy the residency requirements.

> Those who have no choice in the marital state of their parents should not be so penalized or stigmatized, and their rights to citizenship should not be dependant on the moral fortitude (or lack thereof) of one of their parents. The unfairness is exacerbated by placing such power in the hands of the male parent. The law was thus discriminatory in its impact upon children born out of wedlock and sexist in making citizenship dependent upon the acquiescence of the male parent only. *LeBrun v. Thornburgh,* F. Supp. at 1206.

In addition to *LeBrun v. Thornburgh,* the United States Ninth Circuit Court of Appeals, in *Wauchope v. Department of State,* 985 F.2d 1407 (9th Cir. 1993), hereinafter cited as *Wauchope,* declared unconstitutional a nationality law which also drew unlawful distinctions among transmitting citizenship on the basis of gender.

Section 1993 of the Revised Statutes of 1874, allowed American citizen males, but not American citizen females, the right to pass on their citizenship to foreign born offspring. The Court in *Wauchope* found this statute's impermissible gender-based discrimination was constitutionally infirm as a violation of the equal protection component of the Fifth Amendment's due process clause. See also *Elias v. Department of State,* 721 F. Supp. 243 (N.D. Cal. 1989), where, just as in the later *Wauchope,* the District Court found unlawful gender-based discrimination. The Justice Department abandoned the appeal of *Elias v. Department of State.* Congress subsequently removed the statutory distinction at issue in *Wauchope.* See Immigration and Nationality Technical Corrections Act of 1994. Pub. L. No. 103-416 § 101, 108 Stat. 4306.

Illegitimate children are not recognized as a suspect class and therefore the strict scrutiny standard of equal protection analysis does not apply.

In *Wauchope* the Ninth Circuit applied the rational basis test to determine whether there was a factually legitimate and *bona fide* reason for the discrimination.

In *U.S. v. Virginia,* ___ U.S. ___, ___, 116 S.Ct. 2264, 2275 (1996), the Court indicated a party seeking to uphold government action based on sex must establish an **exceedingly persuasive justification** for the classification and must at least show that the challenged classification serves important government objective. The justification must be genuine and not hypothesized or invented *post hoc* has in response to litigation. Nor can it rely on overbroad generalizations about the difference between males and females.

The legislative history does not articulate any Congressional purpose for the "take away" provision in 8 U.S.C. Section 1409 directed against illegitimate children. The Government argues that the problem of proof should be recognized as a rational basis for the legitimation provisions of 8 U.S.C. Section 1409. The Government's proof rationale fails as either a factually legitimate or *bona fide* reason to justify the unequal treatment. The proof of fatherhood proposal, if recognized, would be constitutionally infirmed as under inclusive as to a Plaintiff who was recognized as being the illegitimate daughter and, in

fact, has been legitimated under the laws of the State of Texas.

The Court of *Wauchope* noted that:

> . . . courts "need not, in equal protection cases except at face value assertions of legislative purposes, when . . . the asserted purpose could not have been the goal of legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) "[W]e [must be] careful not to attribute to the [government] purposes which it cannot reasonably be understood to have entertained." *Christian Science Reading Room v. City and County of San Francisco*, 792 F.2d 124, 124 (9th Cir. 1986) quoting *Delaware River Basin Commission v. Bucks County Water & Sewer Authority*, 641 F.2d 1087, 1097 (3rd Cir 1981) *cert. denied*, 479 U.S. 1066 (1987). *Wauchope*, 985 F.2d at 1415.

Therefore, consistent with the Ninth Circuit's constitutional analysis in *Wauchope*, there is no rational basis and no factually legitimate and *bona fide* reason that exists to justify the legitimation requirement of 8 U.S.C. Section 1409. The requirements were strictly based on stereotypes of the era when enacted.

Judge Wald seems to agree, stating:

> Once parentage has been definitively established, there is no reason to require fathers, but not mothers, to take the additional step of formal legitimation and a written agreement to provide financial support before a child's 18th birthday. (Appendix A, Pet. App. at 18)

If then 8 U.S.C. Section 1409 is unconstitutional under the rational basis test, there certainly is not the "exceedingly

persuasive justification" required by *Mississippi University for Women*, 458 U.S. at 731, 102 S.Ct. at 3340 that must be the solid base for any gender defined classification.

> Of particular significance to this case, the Court has been unwilling to countenance the use of stereotypes to justify lasting distinctions between the mothers and fathers of illegitimate children. In *Caban v. Mohammed*, 441 U.S. 380 (1979), the Court struck down a New York statute that required the consent of a mother and not of a father for the adoption of an illegitimate child, arguing that stereotypes regarding the relationships mothers and fathers will have with their illegitimate children are only acceptable, if at all, in the child's infancy: "Even if unwed mothers as a class were closer to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased." *Id.* at 389. Subsequent case law has established that as the child gets older the extent of the mother's or father's relationship with the child becomes the only relevant basis on which to distinguish between them: "If one *parent* has an established custodial relationship with the child and the other *parent* has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two *parents* different legal rights." *Lehr v. Robertson*, 463 U.S. 248, 267-68 (1983). Needless to say, here we have a statute that distinguishes between fathers and mothers of illegitimate children a substantial period – 18 years – after birth, and does so in addition to requiring clear and convincing evidence of paternity. We also have a statute that

> accords different treatment to U.S. citizen mothers who fail to establish relationships with their illegitimate children until after they turn 18 than to U.S. citizen fathers in the same situation; the mothers can transmit their citizenship to their children despite the lack of an early relationship, whereas the fathers cannot. (Appendix A, Pet. App. at 22)

As was true of the statute in *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760 (1979), 8 U.S.C. Section 1409(a) is another example of "overbroad generalizations" in gender-based classifications.

In *J.E.B. v. Alabama, ex rel. T.B.*, 511 U.S. 127, ___, 114 S.Ct. 1419, 1422, 128 L.Ed.2d 89 (1994), the Court reaffirmed that intentional discrimination on the basis of gender violates the Equal Protection Clause, particularly where "the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."

The Court should again reaffirm that fact in this case. *Fiallo v. Bell*, 430 U.S. 787 (1977), is out of step with the standards applied by the Court in more recent cases and should not remain as precedent in the future.

CONCLUSION

The Petitioner respectfully requests the Court to reverse, in part, the judgment of the District of Columbia Circuit of the Court of Appeals, and remand with instructions.

Respectfully submitted,

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